

# Responding to Overpayments and Non- Compliance

Kim C. Stanger  
Hawley Troxell LLP  
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# Noncompliance...



**Compliance  
Problem**

# Responding to non-compliance...





# Not doing enough to respond...



Can get you in more trouble than when you started...





# Fixing part of the problem...



**But not all of the problem  
or in the wrong way...**



# Can lead to disaster...







# Overview

- Compliance issues
- Responding to non-compliance
  - Internal investigations
  - Overpayments and/or disclosures
  - Government investigations
- Compliance programs

# Written materials (I think...)

- OIG Supplemental Compliance Guidance for Hospitals
- OIG Compliance Guidance for Individual and Small Group Physicians
- Article, *Managing Provider Overpayment Problems*
- OIG Self-Disclosure Protocol
- OIG Open Letters to Providers re Self-Disclosure
- Sample compliance plan



# Compliance issues



# Compliance issues



- Top compliance issues?
  - See OIG Compliance Program Guidance
    - Hospitals + Supplement
      - See pages 4859-74
    - Individual and Small Physician Practices
      - See pages 59439-41, 59445-48



# Compliance issues: Coding and billing

- Items or services not provided as claimed
- Double billing / duplicate payments
- Billing for non-covered services
- Misuse of provider IDs
- Unbundling
- Upcoding
- Improper use of coding modifiers
- Etc.

# Compliance issues:

## Reasonable and necessary services

- Medicare only pays for items/services that are reasonable and necessary “for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.” (4 USC 1395y(a)(1)(A))
- Physician may be liable for false certification.

# Compliance issues:

## Substandard care

- OIG may exclude entity from govt programs if it provides items or services that fail to meet professionally recognized standards of health care. (42 USC 1320a-7; 70 FR 4870)
- COPs require quality of care.

# Compliance issues: Documentation

- Timely, accurate and complete documentation sufficient to support claim.
  - Site of service
  - Appropriateness of service
  - Accuracy of billing
  - Identity of care provider
- Records should comply with following:
  - Medical record complete and accurate
  - Reason for visit, history, physical exam and findings, prior tests, assessment, diagnosis, plan of care
  - Codes supported by record documentation
  - Progress, response, changes in treatment, etc.



# Compliance issues:

## Inducements, kickbacks, and referrals

- Anti-Kickback Statute
- Ethics in Referrals Act ("Stark")
- Civil Monetary Penalties Law ("CMPL")

Affect items such as—

- Joint ventures with physicians
- Compensation arrangements with physicians
- Arrangements with other health care entities
- Recruitment arrangements
- Discounts
- Medical staff credentialing
- Malpractice insurance subsidies
- Payments to reduce/limit services (e.g., gainsharing)

*See Supplemental Compliance Guidance for Hospitals*

# Compliance issues: Inducements to beneficiaries

- Gifts and gratuities
- Cost-sharing waivers
- Free transportation

# Non-compliance may = Overpayments

- May result from—
  - Billing error
  - Coding error
  - Duplicate processing of claims
  - Duplicate payment from another source
  - Primary payment for which another entity is primarily liable
  - Payment > reasonable charge
  - Payment to physician on nonassigned claim
  - Payment for non-covered services, e.g.,
    - Medically unnecessary services
  - Payment during period of non-entitlement, e.g.,
    - Non-compliance with provider agreement
    - Non-compliance with Stark



# Overpayments

- Provider must refund overpayment unless provider is “without fault” re the overpayment.
  - “Without fault” = provider has exercised reasonable care in billing for and accepting payment, i.e.,
    - Provider made full disclosure of facts re claim, and
    - Based on all info available to provider (including Medicare instructions and regs), provider had reasonable basis for assuming payment is correct or brought issue to FI or Carrier.
  - Presumed to be without fault if overpayment discovered more than 3 years after service unless evidence that provider is at fault.

Hard to  
avoid  
fault



# Health care fraud

## 42 USC 1320-7b(a)(3)

- Cannot conceal or fail to disclose facts affecting initial or continued right to benefits or payment from federal health care program with intent to fraudulently secure such benefits or payments.
- Penalties
  - \$25,000 fine
  - 5 years in prison
  - Exclusion from govt health care programs



# False Claims Act

## 31 USC 3729(a)

- Cannot knowingly:
  - Submit false or fraudulent claim to fed govt for payment.
  - Make or use a false record or statement to get a false claim paid by govt.
  - Make or use a false record or statement to reduce amount owed to govt.
- Civil penalties
  - 3x amount of false claim
  - \$5500 to \$11,000 for each false claim submitted
  - Exclusion from govt health plan

# False Claims Act: Allows qui tam lawsuit

- Relator may sue on behalf of govt.
- Govt may intervene.
- Relator gets % of recovery.



# Idaho Health Care Fraud

## IC 56-209h(6)(h)

- Provider must repay any overpayments or claims previously found to have been obtained contrary to statute, rule regulation or provider agreement.
- Penalties
  - Exclusion from state health programs, e.g., Medicaid
  - Civil penalty of up to \$1000 per violation
  - Referral to Medicaid fraud unit





# Idaho False Claims Act

## IC 56-209h(6)


- Cannot knowingly:
  - Submit claim that is incorrect
  - Make false statement in any document submitted to state
  - Submit a claim for medically unnecessary service
- Penalties
  - Exclusion from state health programs, e.g., Medicaid
  - Civil penalty of up to \$1000 per violation
  - Referral to Medicaid fraud unit

# Other fraud and abuse laws

- *See Compliance Program Guidance for Individual and Small Physician Groups, Appendix B-C at pages 59448-51*



# Overpayments

- 
- Innocent, isolated, or minor overpayments usually addressed through
    - Voluntary refunds
    - Adjustments
  - What about the big ticket items?
    - Large amounts
    - Improper practices over extended period
    - Intentional misconduct or deliberate policies
    - Potential statutory violations

**Remember, not doing enough to respond may cause worse problems...**



# Responding to Potential Non-Compliance







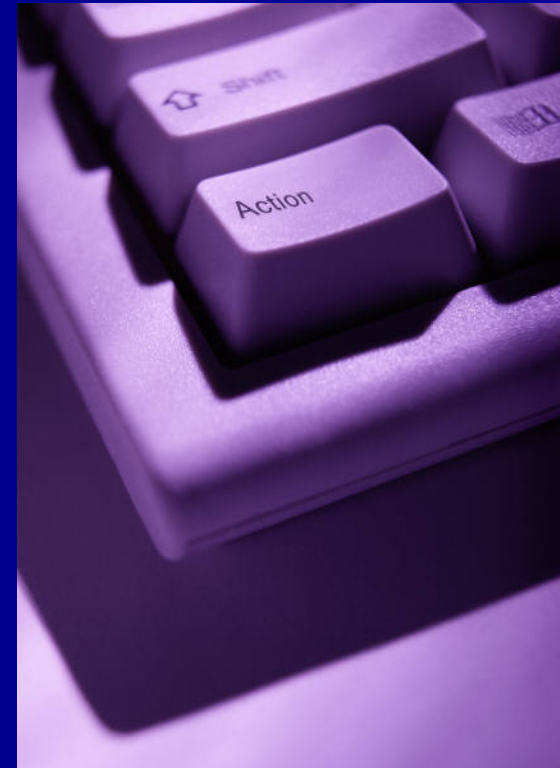
- So you've just discovered there may be a potential compliance problem.
  - Routine audit as part of compliance plan
  - Employee report
  - New program guidance
- What do you do?

# DO NOT DO THIS!



# 1. Promptly respond to all complaints and issues

- Log and track complaints and issues.
  - Date received
  - Description of problem
  - Steps to remedy
  - Date resolved
- Do not:
  - Ignore the problem
  - Forget the problem
  - Cover up the problem



# 1. Promptly respond to all complaints and issues

- Determine significance of the problem.
  - Isolated or widespread, continuing problem
  - Mistake or intentional wrongdoing
  - Policy or practice of errors
- Response depends on significance of problem.
  - Scope of investigation
  - Persons involved

# 1. Promptly respond to all complaints and issues

- Report all complaints and significant issues to appropriate personnel.
  - Serious problem: special meeting
  - Significant problem: as part of normal meetings
    - Compliance officer
    - Compliance committee
    - Administration
    - Board
- \* Allows for additional judgment and input
- \* Provides accountability and ensures follow up

## 2. Be careful how you document



- Maintain confidentiality of all communications and documents concerning investigation.
  - Limit distribution to relevant parties
- Assume that whatever you put in writing will be disclosed.
  - Investigators
  - During a trial or administrative proceedings
  - To other facility personnel
- Be honest, objective, and accurate.
- Do not cover up, overreact, or speculate.



# 3. Stop relevant billings pending investigation

- Billing without knowledge of problem



- Billing with knowledge of problem



# 3. Stop relevant billings pending investigation

- Do not submit tainted bills or claims until issues are resolved.
  - May constitute fraud or evidence improper intent
  - Trigger fraud and abuse statutes
- In serious cases, consider changing, limiting or suspending perpetrator's duties or privileges.
  - Follow applicable processes
    - Employee manuals
    - Medical staff bylaws, rules and regulations

# 4. Never destroy or alter documents

Remember Arthur Anderson and the ENRON scandal?



## 4. Never destroy or alter documents

- Cannot “knowingly alter [or] destroy any record with the intent to impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the united states.”
- Penalties
  - 20 years in prison
  - \$250,000 fine(18 USC 1519)



## 4. Never destroy or alter documents

- Collect and preserve documents.
  - Billing records
  - Internal policies or directives
  - Correspondence, e-mails, memos, program guidance, etc.
- Suspend document destruction policy for relevant records pending investigation.

## 5. Never retaliate



- Creates liability to whistleblower under state and federal statutes.
  - False Claims Act, 31 USC 3730
  - IC 6-2101 (govt employees)
  - Common law tort liability
- Creates appearance of cover up and evidence of fraud.
- Discourages future reports by employees and others.



## 6. Use trusted employees to investigate

- May or may not be compliance officer or member of compliance committee.
- Employees should:
  - Be knowledgeable about relevant issues
  - Have good judgment and discretion
  - Not a “yes” person
  - Maintain confidentiality during investigation
  - Unrelated to suspected conduct
  - Not prone to file *qui tam* action



# 7. Consider using attorney



- For significant issues, may run investigation through attorney to maximize potential for attorney-client or work-product privilege.
  - Attorney directs investigation
  - Reports funneled through attorney
  - Attorney communicates with administration
- But no guarantees of protection.
  - Waiver of privilege by voluntary disclosure
  - Crime-fraud exception to attorney-client privilege

# 8. Consider using outside consultant

- For significant issues, consider using qualified outside consultant or auditor.
- Consider running consultant's actions through attorney to maximize privileges.
  - Attorney retains consultant
  - Consultant reports to attorney
- Carefully define scope of consultant's duties.
  - Dates
  - Issues
  - Documents



Detail from facing page: Plato the teacher, in the likeness of Leonardo da Vinci and holding his Timaeus, strides alongside Aristotle, his greatest pupil, on our right and holding his great work The Ethics.

## 9. Conduct appropriate investigation



- Investigate and document following info:
  - Nature and scope of problem, e.g., amounts, duration, programs and payors affected
  - Applicable rules and regulations concerning violation, including regulatory guidance
  - Clarity of the applicable standards and rules
  - Knowledge and intent of persons involved
  - Prior incidents of misconduct
  - How problem occurred, e.g., system failures, isolated mistake, technical problem, etc.
  - Actions to mitigate or remedy problem

# 9. Conduct appropriate investigation

- Investigation depends on nature and scope of problem.
- Personnel interviews
  - Employees
  - Former employees
  - Providers
  - Others
- Queries to regulators and contractors
  - But be careful about disclosures.
  - Consider making anonymous inquiries through attorney or state-wide organization.

# 9. Conduct appropriate investigation

## ■ Review of records

- Bills, claims, cost reports, etc.
- Clinical records
- Internal policies and procedures
- Internal communications, e-mails, memos, directives, audit results, etc.
- External communications with vendors, providers, contractors, regulators, etc.
- Program rules, regulations, manuals, guidance, fraud alerts, advisory opinions, etc.



# 9. Conduct appropriate investigation

- Audits, statistical samplings, etc.
  - Carefully define scope of audit and methodology
  - Audit should be reasonably designed to determine scope and nature of problems
  - Consider statistically valid samples
  - Not necessarily required to turn over all stones
  - Be careful what you ask for...

# 9. Conduct appropriate investigation

- Document the investigation.
  - Persons interviewed
  - Documents reviewed
  - Conclusions
- Make confidential report to:
  - Compliance committee
  - Administration
  - Board
- *But remember: be careful what you put in writing.*

# 10. Take appropriate action



- Fix the problem.
- Make repayment and/or voluntary disclosure.
- Discipline offenders.
  - Be firm, fair and consistent
  - Follow any applicable procedures
- Provide and document additional training.
  - For affected employee or provider
  - For others
- Revise policies or practices as necessary.



# A word about Stark Period of Disallowance

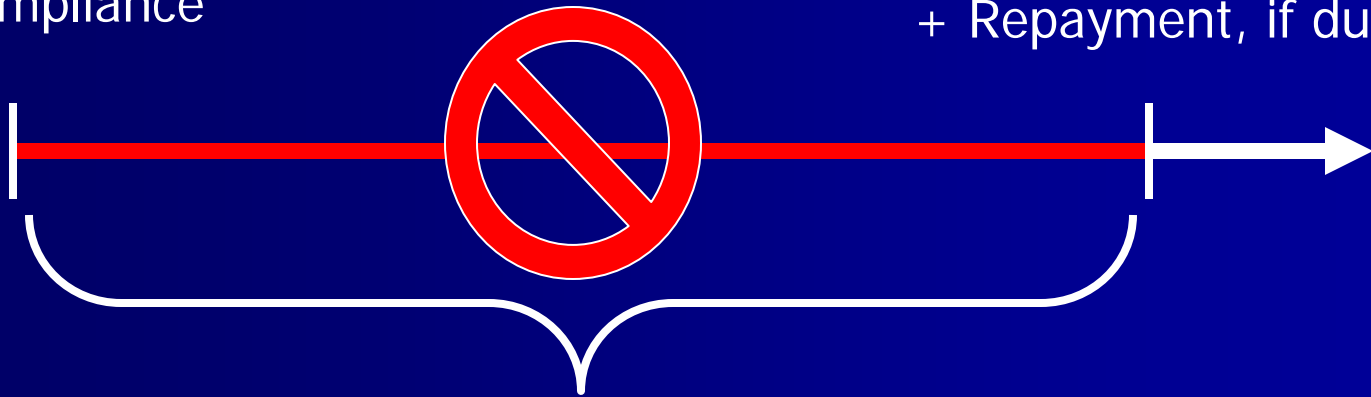
- Period of disallowance = time during which you cannot bill for services
  - Begins with non-compliance
  - Ends when—
    - Financial relationship ends or comply with all terms of safe harbor, and
    - Repay or receive any past payments that are required to bring into compliance.
  - \* Prospective compliance not enough.
  - \* Partial repayment not enough.

# Stark

## Period of Disallowance

Financial relationship  
+ Noncompliance

Financial relationship ends  
or compliance  
+ Repayment, if due



1. Physician cannot refer to DHS entity
2. DHS entity cannot bill for services improperly referred

# Repayments and Voluntary Disclosures





# Repayment and/or disclosure



Remember...

- 42 USC 1320-7b(a)(3): Cannot conceal or fail to disclose facts with intent to fraudulently secure benefit or payment from federal health care program to which it is not entitled.
- IC 56-209h(6): Cannot fail to repay any amounts due because of violation of statute, rule or provider agreement.

# Repayment and/or disclosure

- OIG: "Any overpayments discovered as a result of [internal investigations] should be returned promptly to the affected payor, with appropriate documentation and a thorough explanation of the reason for the refund." (63 FR 8996)

# Repayment and/or disclosure

- 5<sup>th</sup> Amendment

Cannot be forced to testify against yourself (at least in criminal actions).



- OIG

"As participants in the Federal health care programs, health care providers have an ethical and legal duty to ensure the integrity of their dealings with these programs.... Whether as a result of voluntary self-assessment or in response to external forces, health care providers must be prepared to investigate...and make full disclosure to the appropriate authorities." (63 FR 58400; *see also* 63 FR 8987-98)

# Repayment and/or disclosure

## Pros for disclosure

- Govt will probably go easier on you.
- CIAs required in only 27/136 cases involving self-disclosure.
- May reduce FCA liability from 3x to 2x, and cap penalties at \$5,000/claim.
- May avoid or reduce exclusion action.
- Govt not anxious to go after county or rural facilities.
- May avoid *qui tam* action.
- May sleep better at night.

## Cons against disclosure

- No guaranty of protection or mitigation of penalties.
- Disclosure to OIG not binding on DOJ.
- May open the door to broad investigation.
- May be liable for incomplete or false disclosure.
- May waive privileges as to matters disclosed.
  - 5<sup>th</sup> Amendment privilege.
  - Attorney-client privilege.
  - FOIA protections.

# Repayment and/or disclosure

- Bottom line:

- If you learn of overpayment, you should repay and/or disclose facts relating to overpayment.
- Carefully consider whether, to what extent, to whom, and when disclosure should be made.
- Consider seeking advice from experienced attorney.

# Repayment and disclosure: To whom?

- **"Innocent" mistakes:** disclose to and/or repay carrier, intermediary, or relevant govt agency.
  - OIG: "Matters exclusively involving overpayment or errors that do not suggest that violations of law have occurred should be brought directly to the attention of the [contractor]." (63 FR 58400)
    - Medicare: carrier or fiscal intermediary
    - Medicaid: recovery unit?
  - BUT beware: contractor may report to OIG or DOJ.



# Repayment and disclosure: To whom?

- Potential violations of law (i.e., knowingly or with reckless disregard): disclose to--
  - OIG and/or U.S. Attorney
  - Medicaid
- Factors:
  - Knowledge of problems and intentional misconduct.
  - Prior complaints or warnings ignored or covered up.
  - Policies or procedures supporting improper practices.
  - Size, time, and scope of misconduct.
  - Level of employees involved in misconduct.
  - Documents suggesting intentional misconduct.

# Voluntary disclosures: What to disclose?



- **OIG Self-Disclosure Protocol (63 FR 58399)**
  - Not mandatory.
  - Not binding on DOJ or other agencies.
  - Onerous requirements.
    - Make initial written disclosure to OIG.
    - Conduct comprehensive internal investigation.
    - Work with OIG to conduct complete self-audit.
    - Make final detailed disclosure to OIG.
    - OIG will obtain records and will verify.
    - Failure to cooperate or make full and truthful disclosures will work against you.

# Voluntary disclosures: What to disclose?

- OIG Open Letter to Health Care Providers re Self-Disclosure Protocol (April 15, 2008)
  - Initial submission for self-disclosure must contain:
    - Complete description of conduct disclosed;
    - Description of internal investigation or commitment regarding when it will be completed;
    - Estimate of damages to fed health care programs + methodology or commitment when complete the estimate; and
    - Statement of laws potentially violated.

# Voluntary disclosures: What to disclose?

- OIG Open Letter to Health Care Providers re Self-Disclosure Protocol (April 15, 2008)
  - Providers must—
    - Fully cooperate with OIG; and
    - Timely respond to OIG's request for additional information.
  - Or else don't get the benefit of self-disclosure protocol and subject to additional liability.

*Remember...*

**Remember failure to  
properly disclose...**





# Voluntary disclosures: Practical suggestions

- The more serious the problem, the more closely you should comply with OIG Self Disclosure Protocol and Open Letter, e.g.,
  - Intentional fraud
  - Knowing misconduct
  - Documents suggest intentional fraud
  - Policy of misconduct
  - Major problems or reimbursement in scope or size



# Voluntary disclosures: Practical suggestions

- For most disclosures, probably sufficient to disclose to carrier, intermediary, or Medicaid:
  - Nature of the problem
  - Cause of the problem
  - How it was detected
  - How it was corrected
  - Remedial steps taken to prevent recurrence, e.g., training and discipline of responsible parties
  - Amount of damages to federal and state programs based on actual or statistical evidence
  - Include repayment



# Voluntary disclosure: When to disclose?

- False Claims Act: to limit liability, must disclose within 30 days of discovering problem. (31 USC 3729(a))
- OIG Self-Disclosure Protocol:
  - Fraud: disclose immediately without investigation.
  - Other: after initial investigation but within 60 days.

# Voluntary disclosure: When to disclose?

- Practical suggestion: as soon as reasonably possible--
  - To get good will associated with disclosure.
  - To avoid disclosure by a whistleblower or *qui tam* relator.
  - After some investigation to determine basic facts and scope of problem and initiate remedial efforts.
  - Consider sending letter to govt agency advising of investigation.

# Introducing...

Lori Stiles

Medicaid Fraud and  
Program Integrity Unit

334-0653

[stilesl@dhw.idaho.gov](mailto:stilesl@dhw.idaho.gov)



# Compliance Plans



# Why have a compliance plan?

Not mandatory, but...

- Facilitates compliance if effective.
- May mitigate punishment under Sentencing Guidelines, False Claims Act, and exclusion law and regs.
- May improve bottom line performance.
  - Capture revenue that facility might otherwise miss.
  - Avoids reimbursements, penalties, and related expenses.
- May help identify and prevent patient care problems.
- Boosts morale and strengthens culture of integrity.
- Provides formal vehicle for compliance education.
- Right thing to do.



# Why have a compliance plan?

## If you don't do it, the govt will

- Fraud and abuse laws
- Corporate integrity agreements ("CIA")
  - 3-5 year duration
  - Annual and other audits at facility's expense
  - Mandatory self-reporting within days
  - Annual certification and report to OIG
  - Mandatory training for staff and vendors
  - Violation results in exclusion from Medicare
- \* Existence of effective compliance plan may help avoid corporate integrity agreement (*see* Open Letters to Health Care Provider dated 3/9/00 and 4/24/06)

# Status of your compliance plan: Is it current?

- Most facilities have a compliance plan.
  - Big push in 1998 to establish compliance plans
- But...
  - Does it include elements govt recommends?
  - Does it include information from recent supplements?
  - Does it address recent govt enforcement issues?
  - Does it fit current circumstances?
  - Does it fit current practices?
  - And, most important...

# Status of your Compliance Plan: Is it effective?

- Can facility employees and related providers articulate compliance standards and expectations?
- Do persons know how and to whom to report suspected compliance problems?
- Is there a clearly defined way to handle problems that are reported?
- Do you have audit or monitoring programs in place to identify real or potential problems?
- What do you do about problems that are found, including:
  - Disclosures and repayments?
  - Discipline of employees?

# OIG Compliance Program Guidance

- Hospitals (2/98)
  - Supplement (1/05)
- Individual and small group physician practices (10/00)
- Nursing facilities (3/00)
  - Supplement (9/08)



Available at [www.oig.hhs.gov/fraud/complianceguidance](http://www.oig.hhs.gov/fraud/complianceguidance)

# OIG Compliance Program Guidance

- Not mandatory
- Not a compliance plan itself
- Provides a framework for elements of a compliance plan
- Identifies key compliance concerns
- Feds will provide some deference if your plan addresses the elements and standards in the OIG model
  - 7-elements are based on Federal Sentencing Guidelines

# OIG Compliance Program Guide: Elements

1. Written standards, policies and procedures
2. Compliance officer and committee
3. Effective education and training
4. Open lines of communication, e.g., hotline
5. System to respond to and enforce compliance issues
6. Audits or evaluations to monitor compliance
7. Investigation and remediation of compliance issues



# Supplemental hospital compliance guidance

- Provides questions to help evaluate effectiveness of compliance plan.



# Sample compliance program

- Designed to cover 7 elements in basic fashion.
- If used, it should be modified to fit your particular circumstances.
- Inaccurate compliance plan is worse than no compliance plan at all.
  - Ineffective
  - Evidences non-compliance



# Questions?



Kim C. Stanger  
Hawley Troxell LLP  
388-4843  
[kcs@hteh.com](mailto:kcs@hteh.com)